

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

ANGELYN C. SOTIRAKOS	:	
	:	
v.	:	C.A. No. 11-293ML
	:	
RHODE ISLAND PRIMARY CARE	:	
PHYSICIANS CORP., et al.	:	

**MEMORANDUM AND ORDER**

Pending before me for determination (28 U.S.C. § 636(b)(1)(A); LR Cv 72(a)) is Defendants' Motion to Quash Subpoena Served by Plaintiff upon Lorraine A. Horton, CPA d/b/a L. Horton and Associates. (Document No. 12). The Subpoena compelled both appearance at deposition and production of documents. (Document No. 12-1). Ms. Horton also independently filed an Objection to the Subpoena. (Document No. 11). A hearing was held on October 17, 2011.

Defendants contend that Ms. Horton is a non-testifying expert employed in anticipation of litigation and thus the information sought is work-product protected from disclosure under Fed. R. Civ. P. 26(b)(4)(D). Plaintiff disputes Ms. Horton's status as a non-testifying expert and contends that she is a percipient fact witness subject to discovery and, alternatively, that, even if she is a non-testifying expert, "exceptional circumstances [exist] under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Fed. R. Civ. P. 26(b)(4)(D)(ii).

In her Verified Complaint, Plaintiff alleges defamation, extortion and the violation of state and federal whistleblower statutes, against her former employer and related

individuals/entities. Plaintiff alleges that she was forced out of her job in early 2011 and that, on February 28, 2011, Defendant Benedict falsely informed her former co-workers that she was fired for misappropriating money from the Defendant companies. (Document No. 1, ¶¶ 80, 82). She also alleges that, on March 2, 2011, Defendant RIPCPC's Board of Directors issued a Memorandum to the practices of the approximately 160-member physicians of RIPCPC informing them that Plaintiff was terminated and that "it is our belief that [Plaintiff] has misappropriated Corporation property." Id., ¶¶ 94, 95. The Memorandum also indicated that the Board was "in the process of conducting a forensic audit to determine the exact amounts which have been misappropriated, and we will consider all remedies at our disposal once it is complete." Id., Exs. A and B.

On March 4, 2011, Ms. Horton forwarded an engagement letter to counsel for the Defendant companies. (Document No. 12-2). It provides that Ms. Horton's firm would provide "litigation support services" to "be determined as the case progresses, but [ ] expected to include an accounting investigation into actions by RIPCPC personnel." Id. Counsel signed the engagement letter on March 8, 2011. Id. Although this action was not filed until July 18, 2011, it appears that serious allegations were being made in both directions well before Ms. Horton's engagement. Defendants assert that Plaintiff made her own allegations of financial wrongdoings and took some of those allegations to the Rhode Island State Police in early February 2011. (Document No. 12 at p. 4). Defendant RIPCPC also asserts that it engaged counsel on or around February 22, 2011 "to represent it with respect to the...misappropriation and the allegations of

Plaintiff.” Id. This counsel was the same one who hired Ms. Horton approximately ten days later.

Defendants have met their burden of establishing that Ms. Horton was retained in anticipation of litigation and thus Plaintiff “may not, by interrogatories or deposition, discover facts known or opinions held by” her. See Fed. R. Civ. P. 26(b)(4)(D). Given the timing and nature of the allegations exchanged, it was reasonable for Defendants to conclude that this dispute was likely headed for litigation when Ms. Horton was retained – either offensive litigation to collect the allegedly misappropriated money or defensive litigation to defend Plaintiff’s own allegations of financial improprieties. See Milder v. Farm Family Cas. Ins. Co., 2008 WL 4671003 (D.R.I. 2008).

“The party seeking discovery from non-testifying retained experts faces a heavy burden,” 8A Wright and Miller, Federal Practice and Procedure, § 2032 at p. 105 (2010). Plaintiff has not presently met that heavy burden. Plaintiff initially argues that Ms. Horton may be a percipient fact witness to the alleged defamation or other relevant events. In particular, Plaintiff contends that discovery of Ms. Horton should be permitted “to demonstrate, at a minimum, what the defendants did or did not ‘know’ or rely upon when they made their statements implicating the plaintiff.” (Document No. 15-1 at p. 12). Plaintiff does not show why that information cannot be discovered from other sources such as Defendants themselves. If a defendant testifies that an allegedly defamatory statement about Plaintiff was made based on, or in reliance upon, financial information provided or compiled by Ms. Horton, then Plaintiff may have grounds to argue that Ms. Horton is a percipient witness. However, Plaintiff has offered no factual support

for such assertions, and they are entirely speculative at this point. Discovery is in the early stages, and it appears that Plaintiff has not yet fully pursued other avenues of discovery and apparently chose for strategic reasons to start with Ms. Horton. If future discovery reveals a factual basis for a finding that Ms. Horton may also be a fact witness, Plaintiff can then seek leave of Court to conduct Ms. Horton's deposition. Plaintiff also contends that "exceptional circumstances [exist] under which it is impracticable for [her] to obtain facts or opinions on the same subject by other means." See Fed. R. Civ. P. 26(b)(4)(D)(ii). Plaintiff has not, however, made a supported showing of such circumstances. Defendants concede that Plaintiff is entitled to relevant discovery of its financial records.<sup>1</sup> Plaintiff is also entitled to depose fact witnesses about the claims and defenses in this case. Finally, Plaintiff can retain her own non-testifying financial expert to review the fruits of her discovery and to analyze and opine on such materials.

Plaintiff has offered nothing beyond speculation at this point to justify the discovery directed at Ms. Horton. If such a thin showing was sufficient, it would turn Rule 26(b)(4)(D) on its head, and discovery directed at non-testifying retained experts would become the rule rather than narrowly limited to "exceptional circumstances" as expressly provided in the Rule.<sup>2</sup>

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<sup>1</sup> On March 4, 2011, Plaintiff's counsel wrote to Defendants' counsel and requested that he advise them "immediately to preserve all electronic and paper records of RIPCPC and of Polaris, including all Quick Books files, all email accounts, and all paper files and rates pertaining to the companies' and Mr. Benedict's funding and financial transactions...." (Document No. 12-3 at p. 3). There is no allegation that Defendants have ignored this preservation request.

<sup>2</sup> Plaintiff also argues that the disclosure of Ms. Horton's investigation to Mr. Benedict and Dr. Puerini acts as waiver of any claimed work-product privilege. However, the flaw in this argument is that Mr. Benedict and Dr. Puerini are co-Defendants in this case and, respectively, the COO and CEO of RIPCPC/Polaris. Plaintiff has not shown that the sharing of privileged information among co-Defendants related to a common adversary, constitutes a waiver under these circumstances. Cavallaro v. United States, 284 F.3d 236, 250 (1<sup>st</sup> Cir. 2002) (discussing common-interest exception to waiver by disclosure in context of attorney-client privilege).

For the foregoing reasons, Defendants' Motion to Quash the September 9, 2011 Subpoena Served by Plaintiff upon Lorraine A. Horton, CPA d/b/a L. Horton and Associates (Document No. 12) is GRANTED. In addition, Ms. Horton's Objection to such Subpoena (Document No. 11) is SUSTAINED.

SO ORDERED

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
October 28, 2011